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Contents

Abbreviations

APB	Atrocity Prevention Board
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission on Human and Peoples' Rights
AU	African Union
Basic Principles	Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CESCR	Committee on Economic, Social and Cultural Rights
Code of Conduct	Code of Conduct for Law Enforcement Officials
CPA	Coalition of Provisional Authorities
CP rights	Civil and Political Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR	European Court of Human Rights
ESC rights	Economic, Social and Cultural Rights
GA	General Assembly
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide
Hague Regulations	Respecting the Laws and Customs of War on Land
HRCee/HRC (fn)	Human Rights Committee
HRC	Human Rights Council
IAComHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture

IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IO	International Organization
Maastricht Principles	Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights
MRT	Moldovian Republic of Transdniestria
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
OGPRtoP	Office on Genocide Prevention and the Responsibility to Protect
OHCHR	Office of the High Commissioner for Human Rights
OP	Optional Protocol
OSAPG	Office of the Special Adviser on the Prevention of Genocide
Rome Statute	Rome Statute of the International Criminal Court
RtoP	Responsibility to Protect
SC	Security Council
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNMISS	United Nations Mission in the Republic of South Sudan
UNPROFOR	United Nations Protection Force in Bosnia and Herzegovina
US	United States
VCLT	Vienna Convention on the Law of Treaties
VRS	Army of Republika Srpska
WSOD	World Summit Outcome Document

Glossary of Important Terms

Content and Scope of Obligations

In the context of this study, the terms "content" and "scope" are used in relation to a state's obligations, not the human right. The term "content" refers to what measures states are required to take. The term "scope" refers to the extent of these measures in particular circumstances. The two concepts are connected and are sometimes referred to as an obligation's scope *rationae materiae*.

Capacity (to ensure human rights)

The term "capacity" or "capacity to ensure human rights" is used to refer to any expressions in treaties, case law, or other sources of interpretation that take into account a state's resources, powers, or other factors that influence what it is capable of doing to ensure human rights obligations in particular circumstances.

Violation or Offence

The term "violation" is sometimes used in a general sense as synonymous to an injurious event, referring to the substantive violation of an individual's right by either state officials or private individuals. It is also used to refer to a violation of an international obligation attributable to a state. When discussing only the acts of private individuals, who cannot directly violate international obligations, the term "offence" is used.

Trigger (of knowledge)

The term "trigger" or "trigger of knowledge" is used in reference to obligations to prevent that are only incurred by a state when it has a certain degree of knowledge that there is a risk of a violation or continuing violation.

Threshold

The term "threshold" is used in reference to extraterritorial obligations that are only incurred by a state when it exercises extraterritorial jurisdiction or other forms of influence abroad.

Chapter 1
Introduction

Contents

Abstract There is a great deal of attention for concepts such as conflict prevention and the responsibility to protect, which aim to prevent gross human rights violations. Despite this shift in attention towards prevention, it has remained unclear what legal obligations states have to prevent gross human rights violations under international human rights law. For example, it is unclear what types of obligations states have at different points in time, when they are triggered, what concrete measures they may require and how they apply outside a state's territory. This study sets out to systematically assess the content and scope of obligations to prevent gross human rights violations. The focus is on three specific types of injury prohibited under international human rights law: torture, arbitrary death and genocide. Further distinctions are made between four temporal phases (long-term prevention, short-term prevention, preventing continuation, preventing recurrence) and territorial and extraterritorial obligations.

Keywords Prevent · Gross human rights violations · Responsibility to Protect · Conflict Prevention · Obligation · Human rights law

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Over the past decades, there has been growing attention for a more proactive and preventive approach towards gross human rights violations.[1] This trend can be illustrated with several concrete developments. In 2007, the International Court of Justice (ICJ) held Serbia responsible for its failure to try to prevent the Srebrenica genocide that occurred in Bosnia in 1995.[2] The judgment is remarkable for many reasons, most notably because it is the first time that a state was held responsible for a manifest failure to take measures to prevent genocide in another state. There have also been important developments that are not strictly legal, but have increased the focus at both the national and international level on the prevention of mass atrocities.[3] For example, the concepts of conflict prevention and the responsibility to protect (RtoP) have gained much traction, both promoting a preventive approach towards violent internal state conflicts.[4] Conflict prevention and the RtoP have received a great deal of attention in (legal) scholarship, linking the prevention of atrocities to different human rights obligations.[5]

Despite much scholarly attention for these concrete developments, a cloud of obscurity still surrounds the notion of *international legal obligations* to prevent gross human rights violations.[6] Little in-depth and systematic research has been carried out concerning the questions what states are legally required to do under international human rights law and at what point in time these obligations are triggered.[7] That states have certain legal obligations to prevent gross human rights violations within their territory is undisputed. For example, states have clear and express obligations to take measures to prevent torture, especially for situations of detention.[8] Extraterritorial obligations to prevent gross human rights violations, on

[1] Schabas 2006.

[2] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, 26 February 2007, ICJ Rep 2 (*Genocide* 2007) paras 438 and 450.

[3] The term "atrocities" is used in the context of conflict prevention and the RtoP. The term "gross human rights obligations" is used in the context of international human rights law. Both terms are used in a general sense, without referring to an exact subset of crimes or violations.

[4] Commission on Preventing Deadly Conflict 1997; Moolakkattu 2007, paras 4 and 10–9: The term conflict prevention "denote[s] a number of conflict management-related activities"; International Commission on Intervention and State Sovereignty 2001; UN General Assembly 2005, paras 138–9; Winkelmann 2010, para 2: The term 'responsibility to protect' is used in a non-legal sense" and "fix[es] a clear set of rules, procedures, and criteria" relating to the prevention of and intervention in the occurrence of crimes against humanity, war crimes, ethnic cleansing and genocide.

[5] Gattini 2007; Cuyckens and De Man 2011, p. 111; Gibney 2011; Strauss 2009; Welsh 2010; Zimmermann 2011.

[6] Gattini 2014, p. 38; De Pooter 2009.

[7] This study is limited to studying obligations to prevent gross human rights violations under the regime of international human rights law. See 1.3.1 Delineation.

[8] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT) Article 2(1): "Each State Party shall *take effective legislative, administrative, judicial or*

the other hand, are more ambiguous. It is by now accepted that states do, under certain circumstances, have extraterritorial obligations based on the human rights treaties to which they are a party.[9] But when government officials act abroad, they usually do not have the same amount of power and resources as within their own territory. At the moment, it is still unclear how such capacity-related factors influence extraterritorial obligations to prevent.

Core questions remain unanswered with regard to the content and scope of obligations to prevent gross human rights violations.[10] For example, what types of obligations to prevent are there? When are such obligations triggered?[11] What do they require in terms of concrete measures?[12] What is the content and scope of extraterritorial obligations to prevent and what role does the capacity of states play in that regard?[13] And finally, what trends are relevant for the future development of obligations to prevent gross human rights violations? Without additional clarity on these and related questions, states can all too easily pass the buck and remain bystanders to gross human rights violations.[14]

This research project sets out to systematize and analyze the content and scope of obligations to prevent gross human right violations under international human rights law. For this purpose, a distinction will be made between different temporal phases. The distinction between temporal phases supports the articulation of categories of obligations and offers insight into the triggering role of knowledge for obligations to prevent. A second distinction is made between territorial and extraterritorial obligations. An important element in regard to the latter will be to offer criteria for threshold and capacity that ground extraterritorial obligations to

other measures to prevent acts of torture in any territory under its jurisdiction" [emphasis added] and Articles 10 and 11 on situations of detention.

[9] Milanović 2011.

[10] The term "content" refers to what measures states are required to take. The term "scope" refers to the extent of these measures in particular circumstances. The two concepts cannot be seen as completely separate and are often used together. Together they are sometimes referred to as an obligation's scope *rationae materiae*. In the context of this study, both terms are used in relation to a state's obligations, not the human right.

[11] *Genocide* 2007, above n. 2, para 431: "[A] State's obligation to prevent […] arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk"; International Law Commission 2001a, Article 14(3): A breach of obligations to prevent occurs at the moment of occurrence of the event; Gattini 2007, p. 702: Promotes "a more progressive reading of the time factor of the duty to prevent."

[12] *Genocide* 2007, above n. 2, paras 427 and 429–31: In the context of genocide, prevention implies using all means which are "reasonably available" and "likely to have a deterrent effect"; International Law Commission 1999, chp. V, paras 49–453, chp. 10(c), paras 178–80, chp. 7(c) para 142: In most cases, a duty to prevent will be an obligation of conduct based on due-diligence.

[13] In the context of this research, the term "capacity" or "capacity to ensure human rights" is used to refer to any expressions in treaties, case law or other sources of interpretation that take into account a state's resources, powers or other factors that influence what it is capable of doing to ensure human rights obligations in particular circumstances.

[14] Grünfeld and Huijboom 2007.

prevent. These steps will be elaborated in the course of this chapter, which will offer context and background information (Sect. 1.1), outline the problem (Sect. 1.2) and discuss the research question and design (Sects. 1.3 and 1.4) that will lay the groundwork for all of the following chapters.

1.1 Context: Shift Towards Prevention

The concepts of conflict prevention and the RtoP have increased scholarly and political attention for the prevention of mass atrocities.[15] The great normative appeal of these trends illustrates a broader moral and societal shift towards recognizing the importance of prevention with regard to gross human rights violations. There is also increasing attention for obligations to prevent in the area of human rights law.

1.1.1 Conflict Prevention

The concept of conflict prevention is best described as an organizational principle aiming to prevent the "*violent expression* of conflicts", because preventing all conflict is impossible.[16] The concept can be traced back to the cold-war-era, but its modern understanding was developed by former Secretary-General (SG) of the United Nations (UN) Boutros Boutros-Ghali in his 1992 report "Agenda for Peace."[17] Conflict prevention involves both structural and operational measures to prevent.[18] The difference being that structural measures are aimed at long-term peace and stability, such as a functioning legal system, good governance and meeting basic human needs.[19] On the other hand, operational prevention is focused on situations where violence is imminent and offers strategies for early engagement, such as preventive diplomacy or deployment of troops.[20]

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[15] International Commission on Intervention and State Sovereignty 2001; UN General Assembly 2005, para 138: The R2P offers a basis for the international community to step in if a state itself is 'unwilling or unable' to protect its population in the case of genocide, war crimes, ethnic cleansing and crimes against humanity; Ackerman 2003: A new mixed regime of law and policy in the area of *conflict prevention* has arisen after the cold war.

[16] Moolakkattu 2007, paras 3, 5 and 28.

[17] Secretary-General Boutros Boutros-Ghali 1992; Moolakkattu 2007, para 1.

[18] Commission on Preventing Deadly Conflict 1997, executive summary xix and xxviii; Secretary-General Kofi Annan 2001, executive summary, bullet point 4 and paras 8–10 and 169.

[19] Commission on Preventing Deadly Conflict 1997, executive summary xxviii.

[20] Commission on Preventing Deadly Conflict 1997, executive summary xix.

Key documents in the area of conflict prevention have addressed the important role of the UN.[21] A core goal of the UN has always been the prevention and management of armed conflict and it has developed an impressive infrastructure in that regard.[22] Yet, several crises took place in the 1990s, such as the Rwanda and Srebrenica genocides, in which UN involvement was not perceived to have been very effective. The aftermath of these crises inspired a renewed pledge by UN SG Kofi Annan to move "from a culture of reaction to a culture of prevention" in his 2001 report entitled "Prevention of Armed Conflict".[23] His report stresses that the primary responsibility for conflict prevention rests with states and the main role of the UN is to support national efforts.[24]

Like the UN, many states and regional organizations have adopted and started mainstreaming conflict prevention into their foreign policies and external relations.[25] There has also been an institutional response at these levels. An example is the Organization of the African Union's Peace and Security Council, tasked with the anticipation and prevention of conflicts.[26] At the state-level, an important example is an initiative taken by President Obama in the United States in 2011, to establish a national Atrocity Prevention Board (APB).[27] The APB was tasked with the specific mandate to devise protocols "to coordinate and institutionalize the Federal Government's efforts to prevent and respond to potential atrocities and genocide" and "creating a comprehensive policy framework for preventing mass atrocities."[28]

There is still much that can be done to make existing frameworks for the prevention of violent conflict more effective. Within the UN, a recent attempt at putting a culture of prevention into practice is the "Rights up Front" initiative.[29] This initiative was taken by the SG in reaction to a 2012 Internal Review Panel's findings on UN failures in Sri Lanka.[30] The idea behind the initiative is that the protection of human rights always comes first in strategic or operational

[21] G8 Foreign Ministers Meeting 2000; Commission on Preventing Deadly Conflict 1997, executive summary xi–xliv.

[22] Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) preamble, Articles 1(1) and 3(3).

[23] Secretary-General Kofi Annan 1999; Secretary-General Kofi Annan 2001, executive summary.

[24] Secretary-General Kofi Annan 2001, executive summary and para 6.

[25] Aggestam 2003; Cuyckens and De Man 2011, pp. 115–7; see generally: Van Walraven and Van der Vlugt 1996.

[26] Assembly of Heads of State and Government of the OAU 1993; Protocol Relating to the Establishment of the Peace and Security Council of the African Union, opened for signature 9 July 2002 (entered into force 26 December 2003) http://www.peaceau.org/uploads/psc-protocol-en.pdf. Accessed 2 August 2017, Article 3b; AU Commission 2000; Moolakkattu 2007, para 19.

[27] Barrack 2011.

[28] Ibid.

[29] Secretary-General Ban Ki-Moon 2013; for more information, visit the website: https://www.un.org/sg/en/content/ban-ki-moon/human-rights-front-initiative. Accessed 2 August 2017.

[30] Secretary-General's Internal Review Panel 2012, paras 75 onwards on United Nations Failure.

decisions.[31] By and large, it is safe to say that conflict prevention has contributed greatly to an enhanced focus on prevention and human rights in conflict situations.

1.1.2 Responsibility to Protect

The historic development of the concept of the RtoP shows a significant overlap in terms of language, framework and instruments with that of conflict prevention.[32] In the wake of the crises in Rwanda and Srebrenica, UN SG Kofi Annan in his millennium report famously challenged the international community to find a way to reconcile sovereignty with preventing and intervening in gross and systematic violations of human rights.[33] In response, the Canadian government set up the International Commission on Intervention and State Sovereignty (ICISS) in 2000, which issued a report on "The Responsibility to Protect" a year later.[34] The report submits that outside intervention is only warranted if the home state is *unable or unwilling* to protect its people from mass atrocities.

The RtoP has been a vehicle for the gradual acceptance of international involvement in the prevention of and reaction to grave humanitarian crises. Where the notion of humanitarian intervention always remained controversial, the novelty of rephrasing sovereignty in terms of responsibility and strong emphasis on prevention instead of military intervention seemed to slowly bend the will of the international community of states in favor of concerted action.[35] In 2005, the RtoP was accepted in non-binding form in the World Summit Outcome Document (WSOD).[36] The WSOD was unanimously adopted by heads of state and government and is, so far, the most authoritative source proclaiming the RtoP. The WSOD specified the crimes to which the RtoP applies as genocide, war crimes, crimes against humanity and ethnic cleansing.

Following the adoption of the WSOD, the path began towards consolidating a shared understanding and putting the RtoP into practice.[37] An important impulse in

[31] Rights up Front Summary: http://www.un.org/News/dh/pdf/english/2016/Human-Rights-up-Front.pdf. Accessed 2 August 2017.

[32] Cuyckens and De Man 2011.

[33] Secretary-General Kofi Annan 2000.

[34] International Commission on Intervention and State Sovereignty 2001.

[35] International Commission on Intervention and State Sovereignty 2001; although the distinction between humanitarian intervention and the RtoP is not strict and their history is mostly shared, see: Hilpold 2014; Office on Genocide Prevention and the Responsibility to Protect 2014, pp. 2 and 4: The earlier action is taken, the cheaper it will be.

[36] UN General Assembly 2005, paras 138–9: where the ICISS left the door slightly open to the use of force without SC authorisation, the GA shut that door and declared the SC as the ultimate authority to decide on any form of military intervention; on the drafting history, see: Strauss 2009, pp. 293–9.

[37] Luck 2011.

that regard comes from the UN SG reports on the RtoP. The 2009 SG report on the implementation of the RtoP introduced a three-pillar structure that became very influential. The three pillars are: (i) States' responsibility to protect their own population; (ii) The international community's responsibility to assist states in meeting their pillar one responsibilities; and (iii) The international community's responsibility to take timely and decisive action if a state is manifestly failing in regard to its pillar one responsibilities.[38] Another significant impulse for implementation of the RtoP was the establishment of a joint office for the UN Special Advisers on the Prevention of Genocide and the Responsibility to Protect in 2007. In 2014, the Office on Genocide Prevention and the Responsibility to Protect (OGPRtoP) introduced a "Framework of Analysis for Atrocity Crimes—A Tool for Prevention."[39] The framework maps different risk factors for RtoP crimes and thereby aims to support prevention strategies.

Although it is unlikely that the RtoP will become fully accepted as customary law, it may influence the development of international law in other ways.[40] As Alex Bellamy has aptly argued, the RtoP cannot offer a strong compliance pull to catalyze third pillar action that states would not otherwise be willing to undertake.[41] It is in its function as "a policy agenda in need of implementation" that it is likely to have an added value and influence the development of law.[42] The RtoP can offer guidance in the realm of systematizing prevention efforts and strengthening the focus on human rights in (potential) mass atrocity situations.[43]

1.1.3 International Human Rights Law

Quite a few express obligations to prevent violations of human rights exist in international human rights treaties. Express means that the word "prevent" is used in the treaty text in relation to a potential violation. For example, state parties to the

[38] Secretary-General Ban Ki-Moon 2009, summary, pp. 10, 15 and 22.

[39] Office on Genocide Prevention and the Responsibility to Protect 2014.

[40] Statute of the International Court of Justice, opened for signature 26 June 1945, TS 993 (entered into force 24 October 1945) (ICJ Statute) Article 38(1)b; Shaw 2008, p. 70; Salomon 2007, p. 89: Although the RtoP was not adopted in legally binding form, GA resolutions can spark or indicate processes of the development of new rules of customary international law; Strauss 2009, pp. 293–12: A review of the negotiation process of the WSOD and the subsequent practice of the GA and SC show little to no intention of laying down a new rule of international law; Bellamy and Reike 2010, p. 274: There is an important difference in the "legal quality" of the RtoP pillars described in the SG report. The first pillar of the RtoP, responsibilities of states towards their own population, is grounded in many pre-existing human rights treaties prohibiting arbitrary deaths, torture, genocide and international humanitarian law treaties prohibiting war crimes. The same cannot be said for the second and third pillars.

[41] Bellamy 2010, pp. 161–2: This is largely due to the norm's indeterminacy.

[42] Ibid., pp. 158 and 162–6.

[43] Rosenberg 2009, pp. 459 and 463.

relevant conventions are expressly obligated to prevent genocide, torture, enforced disappearances, segregation and apartheid.[44] Sometimes the obligation to prevent is very general and generic.[45] Other times, the obligation is more specific or specified in later provisions.[46] The type of injury that such express obligations to prevent seem to focus on, are violations in relation to a person's life, body or dignity.

Obligations to prevent have found their way into the interpretative discourse of many courts and supervisory bodies.[47] As mentioned above, an important case that has sparked much scholarly attention and attention from other courts and supervisory bodies for obligations to prevent is the 2007 ICJ *Genocide* case.[48] Even if an obligation to prevent is not stated expressly in the treaty text, courts and supervisory bodies have found that due diligence obligations to prevent certain violations are sometimes implied.[49] For example, in the *Velásquez Rodríguez v. Honduras* case

[44] Convention for the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (Genocide Convention), Article 1; Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006); International Convention for the Protection of All Persons from Enforced Disappearance, opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010), Articles 12, 22, 23 and 25; International Convention on the Suppression and Punishment of the Crime of Apartheid, opened for signature 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976), Articles 4 and 8.

[45] See for example the Genocide Convention, above n. 44, Article 1.

[46] See for example the framework of obligations to prevent in the CAT, above n. 8, which is further explained in 2.1 Introduction to the Prohibitions and Obligations to Prevent.

[47] A few examples are: IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, 29 July 1988, Series C No. 4 (*Velásquez Rodríguez*), paras 166 and 188: The IACtHR determined that the general obligation under the Convention to ensure the rights therein, also includes an obligation to prevent violations; ECtHR, *Osman v. the United Kingdom*, Merits, 28 October 1998, no. 23452/94, para 116: The ECtHR interpreted the right to life as sometimes warranting a state to take preventive operational measures; ECtHR, *Opuz v. Turkey*, Merits, 9 June 2009, no. 33401/02, paras 169–70 and 176: The ECtHR interpreted the prohibitions of torture as sometimes warranting a state to take protective measures for the purpose of deterrence; *Genocide* 2007, above n. 2, para 438: The ICJ interpreted Article 1 of the Convention as giving rise to a separate obligation to prevent genocide.

[48] *Genocide* 2007, above n. 2, para 438: Article 1 of the Genocide Convention contains an obligation to "prevent and punish" genocide. The ICJ not only explained that the obligation to prevent is a separate obligation, it also interpreted it as broad in scope; see for cross reference: Netherlands, The Hague District Court, *Mothers of Srebrenica against the State*, Merits Highest Instance, 16 July 2014, C/09/295247/ HA ZA 07-2973 (*Mothers of Srebrenica*), paras 4.9 and 4.178; Ruvebana 2014.

[49] Human Rights Committee 2004, para 8: States may be obligated to make preventive efforts with regard to risks of violations of certain rights by other individuals within their jurisdiction, such as the right to life or the prohibition of torture. The HRC also interprets Article 2 of the ICCPR as encompassing a general legal obligation of the Article 2 obligation imposed on state parties as including an obligation to prevent recurrence of violations; *Velásquez Rodríguez*, above n. 47, para 166: Describing a general obligation to "organize the governmental apparatus […] so that [it is] capable of juridically ensuring the free and full enjoyment of human rights", which also entails an obligation to prevent.

the Inter American Court on Human Rights proclaimed the existence of a due-diligence obligation to prevent violations as inherent to the obligation to ensure the rights in the Convention.[50] Additionally, specific human rights have been interpreted by courts or supervisory bodies as including a due-diligence obligation to prevent violations.[51] For example, the European Court of Human Rights (ECtHR) has read an obligation to take operational measures to prevent arbitrary deaths into the provision on the right to life.[52]

Also in non-judicial interpretation or application practices, there has been attention for prevention in relation to human rights violations. Treaty bodies or special rapporteurs are well placed to monitor situations and give early warning of potential violations.[53] Human rights treaty bodies address obligations to prevent for example in their general comments and reports.[54] Special rapporteurs likewise sometimes call attention for obligations to prevent violations.[55] Finally, the International Law Commission (ILC) has since 2014 been working on the formulation of Draft Articles for an International Convention on the Prevention and Punishment of Crimes Against Humanity, with prevention as a central focus.[56] These developments have not gone unnoticed and in 2015, the Office for the High Commissioner on Human Rights (OHCHR) upon the request of the Human Rights Council (HRC) published a report on the role of prevention in the promotion and protection of human rights.[57] This increase in attention for obligations to prevent fits within the broader moral and societal shift towards recognizing the importance of prevention in relation to gross human rights violations.

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[50] *Velásquez Rodríguez*, above n. 47, paras 166 and 188: "These rights imply an obligation on the part of States Parties to take reasonable steps to prevent situations that could result in the violation of that right." This case concerned offences by private individuals.

[51] Koivurova 2007.

[52] *Osman*, above n. 47, para 111: The obligation to respect the right to life may also "imply […] a positive obligation on the authorities to take preventive operational measures."

[53] Shaw 2003, p. 312: In the conclusion of a chapter on treaty bodies he states that the development of preventive procedures and systems of early warning by the treaty bodies is to be 'particularly noted.'

[54] See for example: Subcommittee on Prevention of Torture 2010, para 8; Committee on the Elimination of Discrimination Against Women and Committee on the Rights of the Child 2014.

[55] Office of the High Commissioner for Human Rights 2015.

[56] Whitney R. Harris World Law Institute 2010: The Washington University School of Law took a Crimes Against Humanity Initiative, which led to a proposed convention drafted by a Steering Committee; International Law Commission 2014, chp. 14(a), para 1: "At its 3227th meeting, on 18 July 2014, the Commission decided to include the topic "Crimes against humanity" in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur." Crimes against humanity has been included by the ILC under the topic of criminal law, because the definition of the crime originates in criminal law; Special Rapporteur Sean D. Murphy 2015, chp. 5(a) Obligation to prevent crimes against humanity.

[57] Office of the High Commissioner for Human Rights 2014; Office of the High Commissioner for Human Rights 2015: Among other things, the report seeks to "provide further content to the concept of prevention of human rights violations."

1.2 The Problem: The Content and Scope of Obligations to Prevent

So far, state obligations to prevent in the context of human rights law in general and obligations aiming to prevent gross human rights violations more specifically have not received much structured attention in scholarship. As mentioned above, many core questions related to their territorial and extraterritorial content, scope, triggers and the role of capacity remain unanswered. The legal practice is confusing and in any case has not been well studied.[58] The lack of attention for obligations to prevent gross human rights violations is problematic, especially bearing in mind the shift described in the previous section. Despite rhetorical political support for prevention in the context of conflict prevention and the RtoP, there is often a lack of political will to invest in prevention in practice.[59] If the content and scope of obligations to prevent gross human rights violations are more clearly articulated, states can more easily implement them and be held legally responsible for failures to prevent and there will be less flexibility for a lack of political will to prevail.

There is no univocal definition of obligations to prevent in international law.[60] The ordinary meaning assigned to the word "prevention" is:

> The action of stopping something from happening or arising.[61]

The word "obligation" in the context of international law is related to the sources as expressed in Article 38 of the ICJ Statute.[62] The primary sources of obligations under international law are treaties and custom. Roberto Ago has offered a useful description of the meaning of the terms taken together, stating that obligations (based on treaties or custom) to prevent (stopping something from happening) are aimed at preventing an "injurious event", meaning an act, damage or any other form of injury that has been qualified as prohibited or unwanted in international law.[63] Other than

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[58] *Genocide* 2007, above n. 2; De Pooter 2009; a few positive exceptions in recent studies are: Ruvebana 2014; Office of the High Commissioner for Human Rights 2014.

[59] Bellamy 2008, p. 143: The hallmark of successful prevention efforts is that the results are largely invisible, which makes it hard to garner (financial) support for prevention efforts.

[60] A review of several handbooks of international law showed that the term prevention is used in very diverse ways. See for example: Aust 2010, pp. 306–7: Mentions the concept of prevention in the context of the precautionary principle as a basis for risk prevention in environmental law; Brownlie 2008, p. 745: Mentions the concept of prevention in the context of humanitarian intervention; Cassese 2001, pp. 264–5: Notes that there is a "general obligation of international cooperation for [the] prevention and punishment" of at least "the most odious international crimes such as, in particular, genocide and crimes against humanity"; Schachter 1991, pp. 368 onwards: Schachter identifies prevention as the centerpiece of environmental law and describes how it is qualified differently in different documents addressing different issue area.

[61] Oxford Dictionaries Pro 2010.

[62] ICJ Statute, above n. 40, Article 38(1)a and b.

[63] Special Rapporteur Roberto Ago 1978, chp. 3(8), para 15: Ago further distinguished between obligations which have prevention as their direct object and obligations which have prevention as a side effect.

this very basic description, it is hard to find unifying factors among obligations to prevent in international law. Andrea Gattini writes that "there is uncertainty and disagreement on almost every aspect of an obligation to prevent, concerning the scope of the obligation *ratione personae*, *loci*, *materiae*, and *temporis*."[64]

Uncertainty surrounding the content and scope of obligations to prevent has become apparent for example in connection with the question at which moment in time they are breached. Article 14 of the Articles on States Responsibility proclaims that a breach of obligations to prevent takes place at the moment the injurious event occurs and for as long as it continues.[65] It thereby made the occurrence of an injurious event a necessary condition for a breach of an obligation to prevent. At the same time, the ILC also claimed in the Commentary of the Articles that, in most cases, a duty to prevent is an obligation of conduct based on due-diligence.[66] This claim stands in strange comparison to its decision that a breach occurs at the moment that the injurious event occurs, because obligations of conduct are not aimed at a certain result, in this case non-occurrence of an injurious event.[67] One would expect an obligation of conduct to be breached once the required conduct stays out, regardless of the consequences.[68] Furthermore, there are in fact many examples of obligations to prevent that are obligations of result and can be breached without the occurrence of the injurious event which they aim to prevent, such as the obligation to enact legislation or investigate violations.[69] The ILC's approach therefore gives too simplistic a view of obligations to prevent and their timeframe.

It is submitted that treating obligations to prevent as a non-context-specific and undifferentiated group hampers attempts to further clarify their content and scope.[70]

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[64] Gattini 2014, p. 38.

[65] International Law Commission 2001a, Article 14(3).

[66] International Law Commission 2001a, Commentary to Article 14(3), para 14: "Obligations of prevention are usually construed as best efforts obligations […] without warranting that the event will not occur"; International Law Commission 1999, chp. 10(c), paras 178–80, chp. 7(c), para 142: The reports covering the drafting history of the Articles contain a more nuanced view, stating that obligations to prevent can be of both conduct and result.

[67] International Law Commission 2001a, Commentary to Article 12, paras 11 and 12.

[68] Gattini 2007, p. 702; Gattini 2014, p. 37: "Undoubtedly this rule becomes unpalatable under certain circumstances. This is the reason why, in most criminal codes, the concept of crimes of abstract danger (*Gefährungsdelikte*) has been introduced, in order to punish dangerous conduct, regardless of the occurrence of the damaging event."

[69] For example: CAT, above n. 8, Articles 2 jo 4: The obligation to ensure that torture is an offence under criminal law, as a part of the broader obligation to introduce effective legislative safeguards to prevent torture; *Trail Smelter Case (United States v Canada)* arbitration resulting in special agreement, 16 April 1938 and 11 March 1941, 3 RIAA 1905–1982; UN General Assembly 1992, Principle 2; Soljan 1998, pp. 211 onwards; Bratspies 2010, p. 112: An important customary obligation in environmental law is the prevention of significant transboundary harm. It is a compound obligation, consisting of a set of quite specific subsidiary obligations of result such as carrying out an impact assessment and notifying and consulting with potentially affected states.

[70] The ILC took such a general undifferentiated approach from the viewpoint of its task to codify general rules for international state responsibility. But attempts to understand obligations to prevent as an undifferentiated group can also be found in other places, see for example: Gattini 2014.

That obligations to prevent are aimed at preventing an injurious event, means that it is hard to understand them outside of the context of a specific regime of international law or specific type of injury. In the context of environmental law, for instance, obligations to prevent are aimed at preventing environmental damage and have developed in a very different way from obligations to prevent in the context of human rights law. For example, states have drafted framework treaties that set forth specific targets for the reduction of the emission of greenhouse gases through subsequent amendments to mitigate the threats posed by global warming.[71] Such preventive framework treaties do not exist in the area of human rights law.[72] Furthermore, the type of injury obligations seek to prevent also influences the identification of risks and mitigating factors and therefore the chosen measures and timeframe of obligations to prevent.[73] All is to say that the type of injury strongly influences the way obligations to prevent are shaped.[74]

To avoid the pitfall of taking an undifferentiated outlook, this study will focus specifically on obligations to prevent under human rights law aimed at particular types of injury caused by gross human rights violations.[75] It will build on: (i) A more inclusive timeframe than the one used in Article 14 of the Articles on State Responsibility, leading from long-term prevention to the prevention of recurrence;[76] and (ii) Three spatial dimensions to address obligations in territorial and extraterritorial settings.[77] By taking an approach that differentiates in time and space, a map of obligations to prevent gross human rights violations can unfold that gives detailed insight into their triggers, content and scope. The capacity of states to ensure human rights will prove to be an important factor informing the basis, content and scope of obligations. Existing terminological distinctions between types of obligations, such as conduct and result, positive and negative and the respect, protect, fulfill typology will sometimes be used to describe obligations, but they will also be criticized where their use has led to overgeneralizations.[78] The point of

[71] United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994); Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005).

[72] Nowak 2004, p. 285: Although it could be argued that "each tool for the protection of human rights is preventive by its very nature."

[73] Office of the High Commissioner for Human Rights 2014, paras 5 and 8–10.

[74] International Law Commission 2001a, Article 31: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State, sustained as a result of the wrongful act." The terms injury and damage will be used interchangeably.

[75] See 1.3.1 Delineation: The types of injury chosen for this study are torture, arbitrary death and genocide.

[76] See 1.3.2 Temporal Phases: long-term obligations to prevent, short-term obligations to prevent, obligations to prevent the continuation of a violation, obligations to prevent recurrence.

[77] See 1.3.3 Territory, Jurisdiction and Beyond.

[78] International Law Commission 2001a, Commentary to Article 12, paras 11 and 12: Obligations of conduct require a certain form of conduct, whereas obligations of result require that a certain result is effectuated regardless of the means used; Commentary to Article 41, para 3: A positive obligation requires action, whereas a negative obligation requires abstinence; Shue 1996, p. 52:

this study is to offer alternative categories that better serve the context of obligations to prevent gross human rights violations.

1.3 Research Question and Design

The main research question is:

> What is the content and scope of state obligations to prevent gross human rights violations under international human rights law?

Three sub questions will be dealt with in the three substantive chapters following the introduction:

1. What is the content and scope of state obligations to prevent gross human rights violations within their territory in four temporal phases?
2. How do territorial state obligations to prevent gross human rights violations in the four temporal phases translate to extraterritorial obligations based on jurisdiction?
3. What is the content and scope of state obligations to prevent gross human rights violations extraterritorially beyond jurisdiction and what are relevant trends for the future development of obligations to prevent gross human rights violations beyond jurisdiction?

1.3.1 Delineation

The research addresses obligations to prevent "gross human rights violations", which already implies a delineation.[79] The study will be limited to obligations to prevent *torture, arbitrary death* and *genocide* under international human rights law. The three prohibitions are the mirror images of the rights to be free from torture and genocide and the right to life. Therefore, the primary focus is on international human rights law, but not every obligation to prevent within this regime will be addressed. Zooming in on obligations to prevent violations of three specific prohibitions will allow for a more in depth analysis of their content and scope. All three prohibitions are widely recognized as being of primary importance in international human rights law and their violation is undeniably considered to be a gross human

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Most human rights do not give rise to one single correlative duty, but rather to the intertwined duties to respect, protect and fulfill. The obligation to respect entails that a state must refrain from interfering with the enjoyment of human rights. The obligation to protect entails that a state must protect individuals or groups against human rights abuses. The obligation to fulfill entails that a state must facilitate the enjoyment of human rights.

[79] When an obligation is described as "preventing a violation", violation is meant in a factual manner and not as a legal qualification. It is used similarly to the term "injurious event."

rights violation.[80] It was mentioned above that most express obligations to prevent in human rights law treaties are aimed at preventing injury in relation to a person's life, body or dignity.[81] The selected prohibitions fit neatly within this focus. As such, their analysis can be considered representative for the focus of obligations under human rights law to prevent gross human rights violations. Furthermore, mass atrocities as described in the context of conflict prevention and the RtoP often involve torture and arbitrary deaths. Genocide is in fact one of the crimes recognized as a mass atrocity crime under the RtoP. Analyzing these three prohibitions can therefore also add further clarity to the debate surrounding the approaches to preventing mass atrocities.

The study is framed as a whole in the context of conflict prevention and the RtoP, which begs the question how armed conflict may influence the application and scope of the obligations discussed. This study sets out to clearly define obligations to prevent gross human rights violations under the regime of international human rights law.[82] While the potential influence of armed conflict on the capacity to ensure human rights and content and scope of obligations will be duly explored, the study does not engage the question of the relationship or interaction between human rights law and humanitarian law. Undeniably, obligations under human rights law are sometimes influenced by the (co-)applicability of international humanitarian law.[83] However, this is an issue outside the scope of this study. In general, the two regimes are considered to be complementary and both in principle apply in situations of armed conflict. It is assumed that, even if humanitarian law is sometimes considered *lex specialis*, human rights law may still have a

[80] These prohibitions and corresponding rights have all been included in a range of human rights treaties, have customary law status and the prohibitions of torture and genocide are *jus cogens*. This will be discussed in more detail in the following chapter. See generally: Human Rights Committee 1982, para 3; Committee Against Torture 2008, para 1; ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, 3 February 2006, ICJ Rep 6, para 64; International Law Commission 2001a, Commentary to Article 40, paras 7 and 8: In the context of a Chapter III on Serious Breaches of Obligations Under Peremptory Norms of General International Law, the ILC clarifies that the word "gross" means that a "certain order of magnitude of violation is necessary." This study takes a different and broader approach, where any violation of the three selected prohibitions is considered a gross violation.

[81] See 1.1.3 International Human Rights Law.

[82] As an exception to the primary focus on human rights law, Chap. 4 also considers several obligations from the regimes of humanitarian law and state responsibility and obligations to ensure economic, social and cultural rights.

[83] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 136, para 106; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), common Article 3: Contains a prohibition of "violence to life and person, in particular murder of all kinds" of civilians and persons *hors de combat*; the prohibition of arbitrary death entails different obligations in the two regimes. To determine whether the right to life has been violated under humanitarian law, it matters whether someone is a combatant or a civilian. This distinction plays no role under human rights law.

complementary function or influence the interpretation of obligations under humanitarian law.[84] Others can use the outline of obligations to prevent gross human rights violations under international human rights law when exploring the content and scope of obligations in situations where both international human rights law and humanitarian law apply.[85] An exception is made for the consideration of the influence of the law of occupation on the content and scope of extraterritorial obligations in Chap. 3, because it marks a unique situation in which a state may have a form of prescriptive jurisdiction abroad.[86]

Finally, this research will focus on states as the primary duty-bearers of obligations to prevent gross human rights violations. There has been criticism that an exclusively state-centric focus does not do justice to the limited power states have over the large amount of other actors that impact the enjoyment of human rights.[87] For example, many scholars have argued that International Organizations (IOs) are separately bound by human rights obligations, either because they have legal personality and are bound by customary rules contained in human rights treaties (even though they are not formally a party), or based on the IO's status as a collection of states which are all individually bound.[88] However, it is still under debate exactly what obligations IOs have.[89] Furthermore, options to hold IOs accountable for violations are still very limited, because they are immune from prosecution by domestic courts and there are hardly any separate (judicial) mechanisms of oversight.[90] Apart from IOs, there has been a strong push to include

[84] Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2015, paras 62–4; Ben-Naftali and Shany 2003, pp. 103–5.

[85] Whether obligations discussed in this research are defeated by humanitarian law as *lex specialis* in particular situations is left up to the doctrinal discussion on that topic: Crawford 2012; Dennis 2005; Matthews 2013.

[86] Kamminga 2012, para 1: Prescriptive jurisdiction refers to a state's "authority to lay down legal rules"; Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, opened for signature 18 October 1907, International Peace Conference, The Hague, Official Records (entered into force 26 January 1910), Articles 42–3.

[87] Vandenhole and Van Genugten 2015.

[88] Glanville 2012, pp. 21–3; Toope 2000, p. 187: The provisions of the Genocide Convention oblige the UN to act to prevent genocide. "Beyond this, however, there is an erga omnes obligation owed by the United Nations to the international community to prevent gross violations of human rights. (…) It extends to the United Nations as a collection of states, all subject to this obligation to prevent crimes against humanity. The result of this is that the United Nations is legally and morally obliged to address genocide"; Jorgensen 2012, pp. 430–3: "Like states, international organizations with the capacity to influence are under a duty to act the instant they learn, or should have learned, of the serious risk that genocide will be committed."

[89] See for example: Van Genugten 2015, pp. 44 onwards for a discussion of the human rights obligations of the World Bank Group and the IMF.

[90] Jorgensen 2012, pp. 430–3: In recent decades, there has been a shift of focus from purely moral forms of IO responsibility to formal liability. Jorgensen mentions the *Mothers of Srebrenica* case aimed at UN (even though the UN was held to have immunity from domestic prosecution), the

transnational corporations in the human rights law framework.[91] In 2014, the HRC decided to establish an open ended working group to elaborate a binding treaty on business and human rights.[92] As it currently stands, however, states still have the most central role in ensuring human rights. Human rights treaties address state parties as the primary duty-bearers and most existing frameworks of accountability for human rights violations are focused on states as the potential wrong-doers.[93] Therefore, it makes sense to focus first on the obligations of states. Follow-up research could be envisaged into relevant questions related to obligations of other actors and the influence this may have on the scope of state obligations.

1.3.2 Temporal Phases

The analysis of obligations will rest on a timeline with four temporal phases. There seems to be agreement among scholars working on obligations to prevent under human rights law, conflict prevention and the RtoP that it is useful to divide or group measures based on the factor of time.[94] For example, the original ICISS report on the RtoP divides measures into the responsibility to prevent, react and rebuild.[95] Within the responsibility to prevent, it further distinguishes between root cause prevention and direct prevention.[96] In conflict prevention theory, a conflict cycle is used to identify different stages and strategies for the prevention and management of conflict.[97] The OHCHR report on the role of prevention in the promotion and protection of human rights distinguishes between direct prevention/mitigation and indirect prevention/non-recurrence.[98] In this research, the timeline is built around the cycle of occurrence of a gross human rights violation. Initially based on a preliminary review and confirmed by later use, it is submitted that treaty obligations and accompanying case law involving obligations to prevent gross human rights violations can best be categorized according to the following four phases:

(i) The first phase commences before any indication or knowledge of a possible violation exists (*long-term prevention*).[99] Long-term obligations to prevent

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Draft Articles on the Responsibility of International Organizations, the Independent inquiry into UN's failings with respect to Rwanda and the SG report on fall of Srebrenica.

[91] See 4.3.2 Corporations Acting Abroad; Cernic 2015.

[92] Human Rights Committee 2014.

[93] Vandenhole and Van Genugten 2015.

[94] International Commission on Intervention and State Sovereignty 2001; Cuyckens and De Man 2011, p. 115; Office of the High Commissioner for Human Rights 2014, paras 9 and 10; Ruvebana 2014.

[95] International Commission on Intervention and State Sovereignty 2001, pp. 19, 29 and 39.

[96] International Commission on Intervention and State Sovereignty 2001, pp. 22–23.

[97] Cuyckens and De Man 2011, p. 115.

[98] Office of the High Commissioner for Human Rights 2014, paras 9 and 10.

[99] The term "violation" is used here as synonymous to an injurious event, referring to the substantive violation of an individual's right either by state officials or private individuals.